No. 14,549

IN THE

United States Court of Appeals

For the Ninth Circuit

SPENCER GRANT, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased,

Plaintiff-Appellant,

vs.

JAMES G. SMYTH, former Collector of Internal Revenue,

Defendant-Appellee.

Brief for Plaintiff-Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division

EDGAR T. ZOOK
HENRY V. COLBY
MCKEON & COLBY
310 Sansome Street
San Francisco 4, California
Attorneys for Plaintiff-Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

Page

Introduction 1

Jurisdiction 2

Statement of the Case 2

Facts 2

Contentions 4

The annuity contracts were not includable in Mrs. Grant's gross estate 5

The date of death value of the contracts was $60,980 5

Amount of Recovery 6

Specification of Errors 7

Argument 7

I. The Annuity Contracts Were Excludable from Mrs. Grant's Gross Estate Under the Technical Changes Act of 1949 7

A. The purchase of the annuity contracts resulted in a postponed enjoyment transfer satisfying all requirements for exclusion from gross estate under the 1949 Technical Changes Act 9

B. The purchase of the annuity contracts did not also result in a non-excludable retained life interest transfer 10

(1) The property transferred to plaintiff was only a contract right to receive the annuities after Mrs. Grant's death if he survived her 10

(2) Mrs. Grant did not retain any life interest in the property transferred to plaintiff or the income therefrom 13

II. The Grant Annuity Contracts Had a Value of $60,980 Which Was the Date of Death Cost of Comparable or Survivorship Contracts 25

Conclusion 39

TABLE OF AUTHORITIES

Pages

Chisholm v. Shields, 66 N.E. 93 22
Commissioner v. Clise, 122 F.2d 998 .... 5, 14, 15, 16, 23, 24, 32, 36
Commissioner v. Wilder's Estate, 118 F.2d 281 .... 14, 15, 24
Commonwealth v. Beisel, 13 A.2d 419 22

Estate of Bergan, 1 T.C. 543 .... 18, 19
Estate of Gross, 125 N.Y.S. 2d 149 19
Estate of Twogood, 15 T.C. 989, 194 F.2d 627 .... 12, 17, 31, 32
Estate of Walker, 8 T.C. 1107 .... 31, 32
Estate of Welliver, 8 T.C. 165 32

Galpin's Estate, 295 N.Y.S. 192 20

Higg's Estate v. Commissioner, 12 T.C. 280, 184 F.2d 427 .... 9, 15, 30, 31, 32
Hirsh v. United States, 35 F.2d 982 .... 16, 19
Honeyman's Estate, 129 Atl. 393 21
Hughes v. Sun Life Assurance Co., 159 F.2d 110 21

Krause's Estate, 191 Atl. 162 22

Lincoln v. United States, 65 Ct. Cl. 198 21

Mearkle's Estate v. Commissioner, 129 F.2d 386 .... 14, 15, 23, 32
Morristown Trust Co. v. Manning, 200 F.2d 194 9

Pruyn's Estate v. Commissioner, 184 F.2d 971 .... 9, 15, 32

Scott v. Commissioner, 29 F.2d 472 21
Seaich's Estate, 240 N.Y.S. 524 23

United States v. Ryerson, 312 U.S. 260 .... 31, 32
United States Trust Co. v. Higgins, 56 F. Supp. 997 32

Wishard v. United States, 143 F.2d 704 35

Y.M.C.A. v. Davis, 264 U.S. 47 35

Pages

MISCELLANEOUS

Bliss: "Widows' Pension Plans," Eighth Annual Institute on Federal Taxation, N. Y. University, 1949 30

3 CJS 1383, Sec. 7 12

Internal Revenue Code (1939), Sec. 811(c) 7, 8

Regulations 105:
Sec. 81.10(i)(2) 3, 12
Sec. 81.10(i)(3) 3

E. F. Spurgeon: Life Contingencies, 1939 ed. 27

Technical Changes Act (1949), Sec. 7(b) 7, 8

No. 14,549

IN THE

United States Court of Appeals

For the Ninth Circuit

SPENCER GRANT, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased,

Plaintiff-Appellant,

vs.

JAMES G. SMYTH, former Collector of Internal Revenue,

Defendant-Appellee.

Brief for Plaintiff-Appellant Spencer Grant

Appeal from the United States District Court for the Northern District of California, Southern Division

INTRODUCTION

Plaintiff and defendant both have appealed from the judgment (R. 48) of the District Court (O. D. Hamlin, Judge) directing that plaintiff as executor recover from defendant as former Collector the sum of $28,603.43 on account of an overpayment of federal estate tax. The overpayment was made to satisfy a deficiency assessed by defendant

with respect to certain joint and survivorship annuity contracts which had been purchased by plaintiff's wife several years before her death. The opinion of the Court below is reported in 123 F. Supp. 771 (1954).

The issues presented below were whether the annuity contracts were properly includable in Mrs. Grant's gross estate at all and, if so, what was their value on the date of her death. The District Court determined that the contracts were includable (R. 39-42) and that they had a date of death value of $160,399.45 (R. 42-47). Plaintiff appeals on the grounds that the contracts were not includable in Mrs. Grant's gross estate but that, if they were, they had a value of only $60,980.72 (R. 146). Defendant on his cross-appeal contends that the contracts had a value of $257,117.20 (R. 144).

JURISDICTION

As alleged in the complaint (R. 3) and admitted in the answer (R. 30), the action arises under an Act of Congress providing for Internal Revenue (1939 Code 811(c)).* The District Court had original jurisdiction under 28 U.S.C. 1340 and this Court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Facts

In 1938 and 1939, Mrs. Grant purchased fourteen joint and survivorship annuity contracts from various insurance companies for an aggregate consideration of $390,000 (R. 38). The contracts obligated the insurance companies to pay annuities in the aggregate amount of $20,744.52 to Mrs. Grant and plaintiff jointly each year until the death

*Code references in this brief are to the 1939 Internal Revenue Code.

of either and thereafter to the survivor each year until the death of the survivor (R. 38). We are concerned only with the survivorship provisions.

Mrs. Grant died on March 2, 1947 at the age of 66 (R. 34). Plaintiff, who then was 67 with a remaining life expectancy of 9.96 years (R. 35), survived and thereupon became entitled to the survivorship benefits under the contracts. As executor of Mrs. Grant's estate, he included the contracts in the estate tax return filed for her estate (R. 38). The aggregate returned value of $160,399.45 was computed by use of the formula set forth in Section 81.10(i)(3) of Regulations 105 (R. 38) which, at that time, read as follows:

> "(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday."

The government asserted that the contracts should have been valued under Section 81.10(i)(2) of Regulations 105, which then read as follows:

> "(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts."

In applying this so-called "comparable contract" rule of valuation, the government took the cost of "single life" contracts ($257,117.20) instead of the cost of equivalent "sur-

vivorship" contracts ($60,980.72) on the date of death as the measure of value of the Grant contracts.* Plaintiff paid the consequent deficiency assessment (R. 38), filed claim for refund which was not approved and then brought this action.

Three separate grounds for recovery were relied on below by plaintiff:

> (1) The Grant contracts were not includable in Mrs. Grant's gross estate as a matter of law.
>
> (2) If they were includable, their date of death value was $60,980, this being the date of death cost of comparable or survivorship contracts.
>
> (3) If survivorship contracts were not comparable, no comparable contracts were available and the Grant contracts had a value of $160,399 determined in accordance with established actuarial principles.

The Court below rejected the first two of these contentions and found for plaintiff on the third. Plaintiff appeals in order to preserve his first two contentions.

Contentions

Plaintiff on this appeal maintains that the annuity contracts were not properly includable in Mrs. Grant's gross estate at all but that, if they were, their date of death value was $60,980 instead of the $160,399 determined by the Court below or the $257,117 claimed by defendant on his cross-appeal.

---

*A "single life" contract requires the issuing company to commence payments forthwith to a designated single annuitant for life. A "survivorship" contract requires the issuing company to commence payments to a designated annuitant (called survivor-annuitant) only if and when he survives the purchaser. There being an element of contingency the cost of a survivorship annuity will necessarily be less than the cost of a single life annuity for the benefit of the same annuitant.

THE ANNUITY CONTRACTS WERE NOT INCLUDABLE IN MRS. GRANT'S GROSS ESTATE.

The contracts were excludable from Mrs. Grant's gross estate by reason of the retroactive operation of the Technical Changes Act of 1949 (63 Stat. 891) adopted after the estate tax return was filed for her estate. Section 7 of that Act retroactively exempted lifetime transfers intended to take effect in possession or enjoyment at or after the transferor's death where, as here, no reversionary interest was retained, the transferor died after February 10, 1939, and the transfer was made prior to October 8, 1949 (1939 Code 811(c) as amended by the Technical Changes Act). Mrs. Grant's purchase of the contracts (as to their survivorship provisions) was not also an includable lifetime transfer whereby she retained for life the possession or enjoyment of the property transferred (plaintiff's contingent survivorship interest) or the income therefrom.

The Court below, although conceding considerable merit in this excludability contention as an original question, felt bound by earlier expressions of this Court in *Commissioner v. Clise,* 122 F.2d 998 (1941). So constrained, the Court below concluded that Mrs. Grant had retained possession or enjoyment of the transferred property and, therefore, that the contracts were not excludable under the Technical Changes Act.

THE DATE OF DEATH VALUE OF THE CONTRACTS WAS $60,980.

When Mrs. Grant purchased the contracts, there was an inter vivos transfer by her to plaintiff. The subject of the transfer was his irrevocable contractual right, as donee or third-party beneficiary, to receive the annuity payments for the rest of his life if and when he should survive Mrs. Grant. On the date of Mrs. Grant's death, it would have cost a female the same age as Mrs. Grant $60,980 to have pur-

chased from the same insurance companies contracts obligating them to pay the same annuities to a male the same age as plaintiff contingent on his survival of the female (R. 125-141). Annuity contracts of this sort are known as "survivorship" contracts and, plaintiff contends, are equivalent to the survivorship provisions of the Grant contracts if the "comparable contract" measure of valuation is applicable. Therefore, the date of death value of the Grant contracts was $60,980 which was the cost of comparable or survivorship contracts on that date.

The defendant claims a date of death value of $257,117, this being the date of death cost of contracts obligating the same companies to commence payments forthwith to a male the same age as plaintiff without regard to the contingency of his survival of a female of the same age as Mrs. Grant; such contracts are known as "single life" contracts (R. 43). Such contracts are not actuarily comparable to the Grant contracts because, unlike the latter, there is no contingent element of survivorship.* Use of the cost of single life contracts as the measure of value of the survivorship provisions in the Grant contracts represents the substitution of an entirely different and more costly kind of property for valuation purposes.

Amount of Recovery

It has been stipulated that if the contracts were excludable from Mrs. Grant's gross estate or if their date of death value was $60,980, plaintiff is entitled to recover the principal sum of $29,397.68 (R. 62-63). This is the aggregate

---

*As the Court below held (R. 45), single life contracts also are not comparable to the Grant contracts from an economic benefit standpoint on account of substantial difference in income tax treatment. This is the point which is the subject of the briefs in defendant's cross-appeal.

amount plaintiff paid on September 22, 1950 to satisfy the asserted deficiency, and plaintiff cannot recover more than this amount under the applicable statute of limitations (1939 Code 910).

SPECIFICATION OF ERRORS

1. The Court below erred in concluding that the annuity contracts were includable in Mrs. Grant's gross estate instead of concluding that they were excludable under the retroactive provisions of the Technical Changes Act of 1949 (63 Stat. 891).

2. The Court below erred in finding and concluding that the contracts had a value of $160,399 (discounted present worth) instead of $60,980 (cost of comparable survivorship contracts).

ARGUMENT

I. The Annuity Contracts Were Excludable From Mrs. Grant's Gross Estate Under the Technical Changes Act of 1949.

Section 811(c) of the 1939 Internal Revenue Code, as it read when Mrs. Grant died in 1947, required the inclusion in gross estate of joint and survivorship annuity contracts when the purchaser was survived by the other annuitant. For that reason, the Grant contracts were included in the return filed for her estate in 1948.

In 1949, Section 7(a) of the Technical Changes Act (63 Stat. 891) retroactively amended Section 811(c) of the 1939 Code in several respects. The material portions of the amended statute read as follows:

> "Sec. 811. Gross Estate.
>
> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

"(c) (As amended by Sec. 7(a) of Technical Changes Act of 1949—63 Stat. 891) *Transfers in Contemplation of, or Taking Effect at, Death.*——

"(1) *General Rule.* To the extent of any interest therein of which the decedent has at any time made a transfer * * * by trust or otherwise——

* * * * * * *

"(B) under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property * * *; or

"(C) intended to take effect in possession or enjoyment at or after his death.

"(2) *Transfers taking Effect at Death — Transfers Prior to October 8, 1949.*—An interest in property of which the decedent made a transfer on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1)(C) of this subsection unless the decedent has retained a reversionary interest in the property * * *."

Section 7(b) of the Technical Changes Act additionally provided that the amendment of Section 811(c) made by Section 7(a)

"shall be applicable with respect to estates of decedents dying after February 10, 1939."

The effect of the retroactive 1949 amendment of Section 811(c) was to exclude from gross estate any property the subject of a pre-October 8, 1949 inter vivos transfer intended to take effect in possession or enjoyment on the transferor's death (hereinafter called "postponed enjoyment" transfer) if no reversionary interest was retained by the transferor and his death occurred after February 10, 1939.

A. THE PURCHASE OF THE ANNUITY CONTRACTS RESULTED IN A POSTPONED ENJOYMENT TRANSFER SATISFYING ALL REQUIREMENTS FOR EXCLUSION FROM GROSS ESTATE UNDER THE 1949 TECHNICAL CHANGES ACT.

Mrs. Grant died after February 10, 1939 (on March 2, 1947) and the transfer was made prior to October 8, 1949 (when she purchased the contracts in 1938 and 1939), thus meeting the date of death and date of transfer requirements of the amended statute. Plaintiff's enjoyment of the survivorship annuities was wholly contingent on his survival of Mrs. Grant so that the transfer patently was a postponed enjoyment transfer: *Pruyn's Estate v. Commissioner,* 184 F.2d 971 (C.A. 2—1950); *Morristown Trust Co. v. Manning,* 200 F.2d 194 (C.A. 3—1952). Mrs. Grant obviously had retained no reversionary interest because the contracts were irrevocable and, if plaintiff had predeceased her, the transferred property—plaintiff's contingent survivorship interest—would have terminated forever: *Pruyn's Estate v. Commissioner,* supra; *Higgs' Estate v. Commissioner,* 184 F.2d 427 (C.A. 3—1950). Thus, all elements of an excludable postponed enjoyment transfer were present.

We do not understand that defendant disputes this. He did not do so below. Rather, defendant argued that the transfer was *also* one by which Mrs. Grant retained for her life the possession or enjoyment of the transferred property or the income therefrom (hereinafter called "retained life interest" transfer). Admittedly, retained life interest transfers do not come within the exclusionary provision of paragraph (2) of sub-section (c) of Section 811 as added by the Technical Changes Act of 1949. If a particular transfer were a postponed enjoyment transfer which otherwise would qualify for exclusion from gross estate, it would be includable if it were also a retained life interest transfer. This brings us to grips with the crucial issue on this branch of

the case: Did Mrs. Grant's purchase of the annuity contracts result in a transfer to plaintiff whereby she retained a life interest in the transferred property (plaintiff's contingent survivorship interest) or the income therefrom?

B. THE PURCHASE OF THE ANNUITY CONTRACTS DID NOT ALSO RESULT IN A NON-EXCLUDABLE RETAINED LIFE INTEREST TRANSFER.

We are concerned in this case only with the survivorship provisions of the Grant annuity contracts. If any property was transferred to plaintiff for estate tax purposes, it was only by virtue of the survivorship provisions.* A careful analysis will show that the property transferred to Mr. Grant for present purposes was only a contract right to receive the annuities after Mrs. Grant's death if he survived. Mrs. Grant did not and could not retain for her life the possession or enjoyment of plaintiff's contingent survivorship right or the income therefrom.

(1) The Property Transferred to Plaintiff Was Only a Contract Right to Receive the Annuities After Mrs. Grant's Death If He Survived Her.

The transfer itself took place when Mrs. Grant purchased the annuity contracts during her lifetime. The mechanics of the transfer (or transfers) were simply her payment to each issuing company of the agreed cash consideration for each contract. Each company's contract obligated it to pay the stipulated annuities to Mrs. Grant and plaintiff jointly until the death of either and thereafter to the survivor. In computing the cost of each contract, each company took into account the respective life expectancies of Mrs. Grant and plaintiff as determined by mortality tables. She having been a female and also younger than plaintiff, her chance of sur-

---

*Actually, there was also another transfer to plaintiff. He was jointly entitled with Mrs. Grant to the annuities during their joint lives and his enjoyment of this feature was not postponed, but this right terminated with Mrs. Grant's death.

vival was greater and we may assume that of the total amount paid for each contract the smallest part was referable to the provision entitling him to continue to receive the annuities if he should be the survivor. It is also significant that the contracts were non-participating (in surplus), non-refundable (if both annuitants died before full—or any—return of purchase price), and irrevocable.

We now turn to the question: What was the precise character of the property which, for gross estate purposes, was transferred to plaintiff when Mrs. Grant purchased the contracts? A process of elimination may help in the search for the answer.

Obviously, Mrs. Grant did not transfer any part of the aggregate cash purchase price to plaintiff, nor did the insurance companies. The cash consideration was paid by her to the insurance companies as purchase price; it became an unidentifiable part of their general funds in return for their respective personal obligations to pay the specified annuities to both spouses jointly, first, and then to pay the same amounts as survivorship annuities to the surviving spouse, later. The cash consideration was not earmarked by the companies or chargeable with the annuities; there was nothing in the nature of a trust fund; no fixed principal sum as such or installments thereof were due from the insurance companies. Likewise, the survivorship annuity payments themselves which were paid after Mrs. Grant's death do not constitute the property transferred by her to plaintiff because, as we have noted, there was no specific fund or trust or principal sum chargeable with the annuities and of which the survivorship annuities were or could be the derivative fruit in either a corpus or income sense.

Bearing in mind that the transfer with which we are concerned was a transfer *inter vivos* from Mrs. Grant to

plaintiff—and that it took place at the precise moment when she purchased the survivorship contracts—and bearing in mind also that her death was simply the generating event which brought the subject of the transfer into actual enjoyment by plaintiff as survivor for the first time, it is perfectly clear that the property interest transferred to plaintiff in 1938 and 1939 was a *contract right* to receive and enjoy the annuities if and when he should survive, as he did in 1947. This right corresponded to the contract obligation of the companies as expressed in their annuity contracts to make the payments to him contingent on his survivorship. At the moment of purchase, plaintiff as transferee acquired nothing more or less than the status of a donee or third-party beneficiary under an irrevocable contract. This contract interest was in the nature of an enforceable chose in action; it was a property interest, although of very speculative value; in the absence of express prohibition in the annuity contracts, plaintiff's survivorship contract interest could have been sold or assigned by him at any time before, as well as after, Mrs. Grant's death (3 *C.J.S.* 1383, Sec. 7). The nature of the property transferred as a contract right is confirmed by the fact that under the Commissioner's own regulations (Reg. 105, Sec. 81.10(i)(2)), the value of a survivorship annuity contract is "established through the sale * * * of comparable contracts," provided, of course, that comparable ones are available.

This analysis of the nature of the property transferred as a result of the purchase of a survivorship contract finds expression in the well reasoned opinion of the Tax Court in 1950 in *Estate of Twogood,* 15 T.C. 989 (affirmed in 194 F. 2d 627), where the Tax Court, speaking of a survivorship annuity contract, said (p. 994):

> "It must be remembered that the property with which we are concerned here consisted of the right to receive an annuity."

Of course, the contract right to survivorship benefits which passes to the transferee-annuitant at the moment of purchase of the contract by the purchaser or nominator is a result of the purchase. This does not mean, however, that any part of the cash purchase price itself is transferred to the transferee-annuitant; the benefit or property which he receives is an entirely different one, both legally and realistically. If one pays cash to a car dealer for a car to be delivered to the purchaser's spouse at a future date, the property transferred to the donee-spouse at time of purchase is the contract right to receive the car and not the cash paid for it. Likewise, a contract right is all that passes to the survivor-annuitant. If and when he survives, he can begin to possess and enjoy for the first time the benefits of such right—the annuity payments—but they are only the fruit of the property transferred to him, i.e., the contract right created for his benefit at time of purchase. This being the essence and true nature of the property transferred, we will now show that Mrs. Grant (the purchaser or nominator in this case) retained no interest in plaintiff's survivorship contract right or, for that matter, in the cash purchase price which she paid for his survivorship right.

(2) Mrs. Grant Did Not Retain Any Life Interest in the Property Transferred to Plaintiff or the Income Therefrom.

At the outset we wish to state frankly that there are a few decisions, including one by this Court, which contain some language to the effect that the purchaser of a joint and survivorship annuity contract makes not only a postponed enjoyment transfer but also retains a life interest for gross estate purposes. Chronologically, these decisions are:

Commissioner v. Wilder's Estate, 118 F.2d 281 (CA 5—1941);
Commissioner v. Clise, 122 F.2d 998 (CA 9—1941);
Mearkle's Estate v. Commissioner, 129 F.2d 386 (CA 3—1942).

The question first arose in the *Wilder* case. However, in holding that there was a taxable transfer to the surviving annuitant, the court expressed doubt whether it was a retained life interest transfer (p. 283):

> "The case does not fall under the last part of the above quoted clause about retaining possession or income (retained life interest transfer) so plainly as it does under the broad language preceding (postponed enjoyment transfer)."

In the *Clise* case, this Court expressed the view that there was both a postponed enjoyment and a retained life interest transfer. The court in the *Mearkle* case, following suit, thought that the *Clise* decision made it unnecessary to repeat an analysis of the problem.

In the *Clise* decision, it was said that Mrs. Clise, the purchaser, had not only made a postponed enjoyment transfer to her husband but also had reserved to herself the enjoyment or economic benefit of the contracts during her lifetime just as though she had created a trust for her lifetime benefit with remainder over to Mr. Clise. We respectfully submit that this particular basis for the decision should not be sustained because (1) it actually was unnecessary as a ground for decision inasmuch as taxable status was soundly based on the postponed enjoyment feature of the transfer, and (2) it is in direct conflict with a *multitude* of other tax cases holding that the purchaser does not retain a life interest. These other cases were not brought to this court's attention in the *Clise* case.

The *Wilder, Clise* and *Mearkle* cases were decided prior to the Technical Changes Act of 1949 so that there was no real need to make a close analysis of the precise nature of the transfer to the survivor-annuitant. The courts in those cases concluded that a survivorship contract was includable in the purchaser's gross estate either because there was a postponed enjoyment transfer or a retained life interest transfer or both. In either event, the transfer was taxable. In the later *Pruyn* and *Higgs* cases, supra, which construed the predecessor of Section 811(c) before it was amended in 1931 to include retained life interest transfers, the courts squarely held that the purchase of survivorship contracts effects a postponed enjoyment transfer, and taxable status was predicated on this ground alone. To the extent that *Clise* and *Mearkle* also so hold, they are on solid ground because there is no question that the enjoyment of the transferred property—the contingent survivorship right—is postponed until the transferee-annuitant's survival. But when *Clise* and *Mearkle* go further and say that the purchase transaction is also akin to the creation of a reserved life estate in the purchaser with remainder over, they reflect a profound misapprehension which understandably arose from the fact that prior to the Technical Changes Act of 1949 it was quite unnecessary to make any sharp discrimination.

The fact of this misapprehension is established by numerous tax cases where the courts (including Courts of Appeal, Court of Claims, Tax Court and many state courts) after analysis of the real nature of the purchase transaction have concluded that no life interest in corpus or income is retained by the purchaser of an annuity contract—whether it be a contract for the life of the purchaser alone (a "single life" contract) or, as here, a joint and survivorship contract.

We wish to emphasize that none of these decisions were called to the attention of this Court in the briefs in the Clise case, so that this Court did not have the benefit of knowing that its alternative ground for decision was in conflict with a long and well established line of federal and state court cases.

The opinions in these other cases stress that, on the purchase of an annuity contract, the consideration or purchase price is added to the common funds of the insurance company, becoming part of the company's general assets and losing any separate identity; that the company's obligation to pay the annuities is a purely personal one without regard to the existence of any earmarked fund or whether the company's earnings will be sufficient or not; that no interest or return of principal designated or identifiable as such is to be paid to the annuitant, who has an interest only in the annuity payments themselves and not in any principal fund or source from which they may be derived; that all of the distinguishing characteristics of a retained life interest are lacking, and that no possession or enjoyment of the transferred property or the income therefrom are retained by the purchaser in any sense.

See, for example, *Hirsh v. United States,* 35 F.2d 982 (Ct. Cl. 1925), where a father transferred securities to his children in consideration for their agreement to pay a single life annuity to him and a survivorship annuity to their mother. The Court of Claims held that the annuity contract was not includable in the father's estate as a transfer under which he had reserved the income for life, and said (pp. 985, 986):

> "* * * The transfer was complete upon the execution of the contract and was absolute and without reservation. The transferees entered at once into the possession and enjoyment of the securities. There was no

restriction placed upon their sale or disposal. The transfer was absolute, and decedent completely and irrevocably divested himself of all title, right, or interest in the securities conveyed. It is clear also that the securities were not chargeable with the annuity. Each of the four children was personally obligated to pay a specified annuity regardless of whether any return was received from the securities and each child was financially able to pay the annuity. The decedent had no control whatever over the property conveyed after the transfer, nor did he have any power to change the terms or provisions of the annuity which had been contracted for in the case of each child.

"There seems to us to have been a misunderstanding on the part of the Commissioner as to the effect of the contract. No trust was created thereby.

* * * * * * *

"The defendant relies upon the case of Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123, 125, 73 L.Ed. 410. In that case the property held to be taxable as part of the estate of the decedent had been conveyed by him in his lifetime in trust, reserving the income therefrom for the period of his lifetime and also the right to revoke the trust. It will be readily seen that the decedent in that case did not part with his interest in the property completely, but on the contrary still retained control of it."

In the *Twogood* case, supra, the Tax Court in dealing with a pension plan survivorship annuity contract said (p. 994):

"It must be remembered that the property (transferred) with which we are concerned here consisted of the right to receive an annuity * * *.

"It is clear that the decedent did not possess or enjoy in any way *the property* transferred to the beneficiary * * * (Our emphasis). Likewise, he did not retain *possession* or *enjoyment* of the *income* from such property (Emphasis by Court). The annuity payments

which the decedent received after his retirement did not flow from or have any relation to the property transferred—were irretrievably lost to decedent. In order for the decedent to have retained the income from property transferred, he must have made a transfer to the beneficiary of income-yielding property, the income from which he reserved for his life. This manifestly he did not do, either from a legalistic analysis of the mechanics of the translation or from a realistic view of the true nature of the transfer."

In *Estate of Bergan,* 1 T.C. 543 (1943), the decedent transferred securities and other property to her sister in consideration for the sister's promise to pay an annuity to the decedent for her life. This was a single life, not a survivorship, contract but is analogous for present purposes because the Commissioner argued that the decedent had retained for life the economic benefit of the transferred property so that it was includable in her gross estate. The Tax Court rejected this argument and said (pp. 550-552):

"The respondent further contends * * * that in substance the same result was achieved as if Miss Bergan had transferred the property in question in trust, reserving the income therefrom for life with the provision that upon her death the trust would cease and the corpus be distributed to Mrs. Goggin * * *.

"* * * Upon the completion of the transfer in 1933, the title vested in Mrs. Goggin, who was then free to use or dispose of the property in any way she desired. The transfer, although made in consideration for support, was unconditional and irrevocable. Miss Bergan could not possibly retrieve the property transferred or any part of it, and Mrs. Goggin could have disposed of all of it immediately if she had so desired.

"The respondent strongly contends that in substance Miss Bergan retained for her life the right to the income from the property transferred, and that for this

> reason the property must be included in Miss Bergan's gross estate under Section 811(c), *supra*.
>
> "* * * Mrs. Goggin was free to use the property transferred to her in any way that she pleased. The title vested in Mrs. Goggin and not in any trustee. Miss Bergan did not reserve to herself the income from the property transferred. She had entered into a contract with her sister for support and transferred the property in question as consideration for the contract."

The *Hirsh* and *Bergan* cases, supra, both involved single life contracts and in both the government argued that the purchaser-annuitant retained possession or enjoyment of the property transferred. If, as both courts categorically held, the purchaser of a single life annuity for her own benefit does not make a retained life interest transfer, then *a fortiori* the purchaser of a survivorship annuity for the benefit of another does not.

In *Estate of Gross,* 125 N.Y.S. 2d 149 (1953), there had been included in the decedent's gross taxable estate the value of a joint and survivorship annuity purchased by him several years previously. The surviving widow contended that the amount of state inheritance tax apportionable to the annuity should be collected from the insurance company as a person "in possession" of property included in the taxable estate. The court rejected this argument and said (p. 156):

> "The contractual obligation of the company is to make the specified payments on the first day of each month provided the widow is then alive. There is no requirement that it pay out a fixed minimum amount, nor does it hold any funds on deposit. The company is not a stakeholder or trustee in possession of ascertainable funds but is rather a debtor whose liability is conditioned upon the survival of the annuitant on the first

> of each month. Whether the liability be deemed subject to a condition precedent or a condition subsequent, the obligation does not mature until the first of each month, and then only to the extent of that payment. Death at any time prior to the aforesaid date terminates the company's engagements under the contract. As the liability of the company cannot be ascertained as any fixed sum, however small, and as its obligation matures periodically only, it cannot be said to be in possession of property within the contemplation of the statute."

In *Galpin's Estate,* 295 N.Y.S. 192 (1937), it was held that for estate tax purposes the purchaser under single life and survivorship contracts retained no life interest in the property transferred. The court said (p. 194):

> "The deceased made an agreement whereby he was to receive a stipulated annual sum from the donee, and after his death others were to receive annuities. The agreements set forth and the evidence discloses that title to the sums of money involved passed to the donee during the lifetime of the donor and the funds thereafter were and remained in the possession of the donee.
>
> "One test of the nature of the transaction would be the remedy of the donor in the event of the failure of the donee to have paid the stipulated annual sum. Could he have sued and obtained a cancellation of the agreement and a refund of the money deposited, or would his course have been a suit for the payment of his annuity? I think the latter. And if, by chance, the donee was insolvent, deceased would have been the loser, for there is nothing in the agreements which calls for the segregation of the sums of money paid * * * or the manner of investment of the same by the donee."

The following are some of the innumerable other typical federal and state court decisions holding that the purchaser of a single life annuity contract or, *a fortiori,* of a joint and

survivor annuity contract does not reserve or retain any possession or enjoyment of the property transferred or the income therefrom for estate or inheritance tax purposes:

> *Hughes v. Sun Life Assurance Co.,* 159 F.2d 110 (CA7-1946): "This sum (the purchase price for the annuity contract) became the property of Sun Life and was added to the common fund of the company; it ceased to have any separate identity and became part of the company's general assets * * *; hence Sun Life was not a trustee." (Pp. 111, 113)
>
> *Scott v. Commissioner,* 29 F.2d 472 (CA7-1928): "In the new (joint and survivor) contract the father * * * conveyed the entire interest (in the partnership) absolutely to the sons, specifying as the consideration therefor these annual payments to the father and mother, and removed all interdependence between the annual payments and the profits of the partnership by making the payments a personal undertaking of the sons, wholly regardless of whether there were any partnership profits." (P. 473)
>
> *Lincoln v. U.S.,* 65 Ct. Cl. 198 (1928): "Assuredly it is not to be claimed that Mrs. Lincoln did not immediately divest herself of all title, right or interest in the property conveyed (to her children in consideration for their annuity contract). Beyond all doubt that was her intent * * *. The children were put into immediate possession of and enjoyment of the estate; they were free to use it as their judgment dictated; and if the income therefrom exceeded the sums to be paid the mother annually, the excess was their property * * *. A breach of the contract on the part of the children would not reinvest title in the mother." (Pp. 203, 204).
>
> *In re Honeyman's Estate,* 129 Atl. 393 (N.J. 1925): "There is no restriction or incumbrance on what the donee may do with the thing transferred from the very moment of the transfer * * *. Whatever may hereafter happen to the thing transferred, whether it be by in-

vestment or reinvestment increased, or diminished, or entirely lost, whether the income received therefrom by the donee increases or decreases or vanishes, in no wise varies or affects the obligation of the donee under its promise or (joint and survivorship annuity) contract." (P. 396)

Commonwealth v. Beisel, 13 A.2d 419 (Pa. 1940): "Generally speaking, (an annuity) designates a right—bequeathed, donated or purchased—to receive fixed, periodical payments, either for life or a number of years. Its determining characteristic is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which they may be derived. The purchaser of an annuity surrenders all right and title in and to the money he pays for it." (P. 421)

Chisholm v. Shields, 66 N.E. 93 (Ohio 1902): "An annuity, as understood in common parlance, is an obligation by a person or company to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation * * *. In such an annuity there is no connection, in a tax sense, between the annuity and the gross sum paid therefor." (P. 94)

In re Krause's Estate, 191 Atl. 162 (Pa. 1937): "It is obvious that the donor (purchaser of the annuity) could not have taken the fund away from the college. He retained no interest either in the fund itself or in the income therefrom * * *. There was no restriction on what the college could do with the money. It could do with it as it pleased. The money has been mingled with the general funds of the college, and is not held by it separate and intact. It was not the fund which was liable for the payments to the donor but the college itself * * *. The donor was to get the annuity in a certain number of dollars, irrespective of what the fund made." (Pp. 163, 164)

In re Seaich's Estate, 240 N.Y.S. 524 (1930): "It appears that the decedent parted absolutely and unequivocally with both the possession and the enjoyment of the stock and the debentures as transferred (to his children in consideration for their annuity contract). * * * The gift was a completed one and the obligation for backing up the payment of the per monthly amount to the decedent was the obligation of the beneficiaries of the gift, quite apart from the gift. The decedent divested himself of title to the property when he executed the deed of gift which contained no right of reversion in any manner to himself." (Pp. 526-527)

All of the foregoing decisions and many others like them explicitly hold that no purchaser of *any* type of annuity contract, whether single life, joint life, or survivorship or any combination of these, retains any life interest either in the purchase price paid for the contract or the income therefrom or in the interest transferred to the survivor-annuitant in the case of a survivorship contract. Most, if not all, of these cases involved federal estate tax or state inheritance or estate tax liability and they are on all fours with the present case.

Apart from these precedents, *none of which were called to the attention of this Court in the Clise case* or, apparently, to the attention of the Court of Appeals for the Third Circuit in the *Mearkle* case, the proposition that Mrs. Grant did not make a retained life interest transfer to plaintiff may be illustrated forcefully in another way. We have seen that the only transfer to plaintiff—for gross estate purposes—resulted from the survivorship provisions and not, of course, from the joint life provisions of the contracts. Instead of purchasing joint and survivorship contracts, Mrs. Grant might have purchased separate single life contracts

for her own benefit and separate survivorship contracts for plaintiff's benefit. The net effect would have been precisely the same from an actuarial standpoint. How could it possibly be claimed that Mrs. Grant retained any life interest under such separate survivorship contracts? Combining the joint and the survivorship provisions in a single contract or piece of paper surely does not affect the result from a tax standpoint. If a wife pays $6,000 to a car dealer for his single contract (a) to deliver to her a specified car today and (b) to deliver a similar one to her husband on her death if she dies (as she does) within six months leaving him surviving, what rational basis is there for contending that she retained an interest in the property transferred to him—whether such property be his contingent contract right to receive the second car (as we conceive it to be) or the car itself?

The Fifth Circuit in the *Wilder* case, supra, sensed that the purchase of a survivorship contract is not a retained life interest transfer "so plainly" as it is a postponed enjoyment transfer. The Court below had the benefit of the authorities which counsel in the *Clise* case failed to bring to this Court's attention, and the Court below, after referring to the doctrine of those authorities, said (R. 41):

> "Were the question presented to the Court for the first time with no prior authority (the *Clise* case) the Court would be inclined to believe that there was considerable merit in plaintiff's contention that this was a transfer intended to take effect in possession or enjoyment after death and not a transfer wherein grantor retained for life any possession or enjoyment thereof or the right to the income therefrom."

Now, the *Clise* case was correctly decided on the ground that Mrs. Clise made a taxable postponed enjoyment trans-

fer to Mr. Clise, the survivor. We do not ask that the *Clise* case be overruled. We simply request that the alternate ground for decision in that case be held inapplicable to the present case in view of well established precedent which was not there brought to this Court's attention. The Technical Changes Act of 1949 points up sharply for the first time the need for differentiation between postponed enjoyment and retained life interest transfers.

II. The Grant Annuity Contracts Had a Value of $60,980 Which Was the Date of Death Cost of Comparable or Survivorship Contracts.

Plaintiff made two separate valuation arguments below: *First,* that the Grant contracts should be valued at $60,980 which is the date of death cost of comparable or survivorship contracts, whereas defendant's valuation of $257,117 is the date of death cost of single life contracts which are not comparable from an actuarial or cost standpoint; and, *second,* and alternatively, that no comparable contracts (either survivorship or single life) were available on the date of death so that the Grant contracts had a value of $160,399 determined in accordance with established actuarial principles. The Court below accepted plaintiff's alternative argument and that is the ground for defendant's cross-appeal.

Plaintiff, as will appear in his brief to be filed in answer to defendant-appellant's brief in the latter's cross-appeal, is convinced that the Court below correctly determined that *no* comparable contracts were available for valuation purposes. Such determination was based on differences in economic benefits flowing from unequal income tax treatment of the annuity payments under the Grant contracts on the one hand and under date of death single life or sur-

vivorship contracts on the other hand. However, if the substantial difference in income tax treatment of the annuities is laid to one side and if, as defendant contends, the Grant contracts should have been valued under the "comparable contract" rule of subparagraph (2) of Section 81.10(i) of Regulations 105 (quoted on page 3 of this brief), they had a value of $60,980. This is what it would have cost to purchase equivalent survivorship contracts on the date of Mrs. Grant's death (R. 125-141). The defendant's adjusted value of $257,117 cannot be sustained because it represents the cost of single life contracts which are not comparable from an actuarial or cost standpoint.

The Grant contracts were joint and survivorship contracts which had been purchased by Mrs. Grant. The annuity payments were to be made to Mr. and Mrs. Grant during their joint lives and then to the survivor for the rest of his or her life. Mrs. Grant was the first to die. At her death in 1947, the joint aspect of the contracts came to an end and plaintiff, as survivor, became entitled for the first time to the benefit of the survivorship feature.

The transfer to plaintiff for estate tax purposes took place when Mrs. Grant purchased the contracts in 1938 and 1939. It was an inter vivos transfer for purposes of 1939 Code 811(c), quoted on pages 7-8 of this brief. At the time of purchase, Mrs. Grant gave—or transferred—to plaintiff a then present and irrevocable right to deferred or survivorship annuities to commence on her death if he should survive her. He did. The question now is: What was the value in her estate of this previously transferred contingent right at the time of her death in 1947?

Subparagraph (2) of Section 81.10(i) of Regulations 105 (quoted on page 3 of this brief) states that the answer will be found by taking the cost of "comparable contracts"

as of the date of death. This brings us to the vital question: What kind of contracts are comparable to the survivorship provisions of the Grant contracts? Here, we emphasize again that in determining comparability it must be kept in mind that we are valuing only the survivorship feature of the Grant contracts. For estate tax purposes, only the survivorship feature was the subject of the transfer from Mrs. Grant to Mr. Grant. This consisted of his contingent right to receive the annuities for the rest of his life if and when he should survive her.

Starting with this premise, it is perfectly clear that only annuity contracts of the sort known as "survivorship" contracts are comparable to the survivorship provisions of the Grant contracts for estate tax valuation purposes. A survivorship contract is one which, just as in the case of the survivorship provisions of the Grant contracts, provides for payment of annuities to a designated annuitant commencing if and when the annuitant survives the purchaser, who is sometimes called the nominator. The cost or purchase price is determined in accordance with established actuarial principles (see E. F. Spurgeon: *Life Contingencies,* 1939 ed., Chap. VII, for the actuarial formula). Two life expectancies—determined from mortality tables—must be taken into account in computing the cost. The cost where the annuitant is older than the nominator would be less than where the annuitant is younger because there would be less actuarial chance of the older annuitant surviving the younger nominator and thereupon becoming entitled to the annuity payments. From a cost standpoint, the significant thing is that annuity payments under a survivorship contract are deferred and *are not to commence unless and until the annuitant survives the nominator.* In the present case, the fact that Mrs. Grant (the nominator)

was younger than Mr. Grant (the annuitant) is reflected in the fact that on the date of her death comparable or survivorship contracts would have cost only $60,980 or less than one-quarter of the cost of the "single life" contracts erroneously relied on by defendant.

A "single life" annuity contract, on the other hand, expressly provides for annuity payments *commencing at once* and for this reason is sometimes called an "immediate" annuity. Only a single life expectancy is involved and there is no deferred or survivorship element. In computing the cost of a single life contract, the issuing company takes into account the actuarial life expectancy of the particular annuitant and the fact that annuity payments are to begin at once and continue for the rest of his life. The difference in cost between a survivorship contract and a single life contract for the benefit of the same annuitant is highlighted in this case. On March 2, 1947, it would have cost a female purchaser the same age as Mrs. Grant only $60,980 to purchase survivorship contracts for the benefit of a male the same age as Mr. Grant whereas it would have cost $257,117 on that date for the purchase of single life contracts for his benefit.

The survivorship provisions of the Grant contracts are not comparable to single life contracts. As the subject of an inter vivos transfer by Mrs. Grant when she purchased the contracts in 1938 and 1939—and the value of which we must now determine as of the time of her death on March 2, 1947, the survivorship provisions of the Grant contracts at all times during her lifetime vested in Mr. Grant only a right to survivorship annuities *contingent on his survival of her*. The value of this contingent right on March 2, 1947 was $60,980, which is what it would have cost on that day to purchase comparable or survivorship contracts which would pay the same annuities on the same contingency.

Defendant, in relying on the cost of single life contracts determined after Mrs. Grant's death, closes his eyes to the fact that in valuing the survivorship provisions of the Grant contracts we must by definition take into account two life expectancies—both hers and plaintiff's—not just plaintiff's. Defendant at this point fails to distinguish between the value of the property (a contingent survivorship right) actually transferred by Mrs. Grant to plaintiff during her lifetime and the value of an entirely different contractual relationship which came into existence between plaintiff and the insurance companies only *after* Mrs. Grant's death. *It was the fortuitous fact of plaintiff's survival*—desipte his shorter life expectancy—*and not the inter vivos transfer by Mrs. Grant* or any general improvement in economic conditions which made the Grant contracts more valuable in plaintiff's hands. This greater value in his hands was simply the incidental result of Mrs. Grant's failure to live out her own life expectancy as determined by mortality tables—but this event added nothing to the value of the contingent survivorship contract right which was the subject of the transfer which she made in her lifetime.

The error in defendant's reliance on the cost of single life contracts may be illustrated in another way. Assume that at 9:00 A.M. on March 2, 1947 (the date of Mrs. Grant's death), a female purchaser 66 years old had purchased from Annuity Insurance Company for $60,980 a survivorship annuity contract obligating the company to pay an annuity of $20,774 per year to plaintiff, then 67 years old, if and when he should survive the purchaser. Assume, also, that at 9:30 A.M. on the same day the female purchaser had been accidentally killed. Under defendant's theory, the $60,980 paid by the purchaser at 9:00 A.M. suddenly becomes a transfer of $257,117 at 9:30 A.M. of the same day!

Defendant overlooks the fact that Mrs. Grant never purchased or transferred to plaintiff and he never received any "single life" contract. The right of a person aged 67 to receive $20,774 per year for life beginning at once (as under a single life contract) is in no sense comparable to his right to receive the same annuity only if and when he should survive a female aged 66. It is the latter right—a contingent survivorship right—which must be valued in this case. This is all that Mrs. Grant transferred when she purchased the contracts in 1938 and 1939. This is corroborated in *Estate of Higgs,* 12 T.C. 280 (1949), where the Tax Court said (p. 283):

> "The transferred property was not an annuity for the life of the widow (a single life contract) but was a *survivorship annuity payable* to her for that part of her life *after his death, upon condition that she survive him.*" (Our emphasis).

In the *Higgs* case, the Bureau had contended that the Higgs survivorship annuity contract should have been valued at $78,036 which it would have cost for purchase of a single life annuity contract on the date of Mr. Higgs' death. Mrs. Higgs argued that the Higgs annuity contract should be valued at $33,867 which it would have cost to purchase a survivorship contract. The Tax Court initially rejected the taxpayer's argument for lack of proof of the cost of a survivorship annuity as of the date of death (12 T.C. 283). On reargument on this issue, the missing proof was supplied and the Tax Court held in an unreported decision that the Higgs contract should be valued at $33,867 which was the cost of a survivorship contract (see the first footnote to the Court of Appeals' opinion in 184 F.2d at page 428; also Bliss, "Widows' Pension Plans and the Higgs Case," Eighth Annual Institute on Federal Taxation, N. Y.

University, 1949, pp. 376-384). The Court of Appeals reversed on the ground that the contract was excludable from gross estate under the Technical Changes Act of 1949 adopted after the Tax Court's decision: *Higgs' Estate v. Commissioner,* 184 F.2d 427 (C.A. 3—1950).

The Tax Court in 1950 reaffirmed its position on this point in *Estate of Twogood,* 15 T.C. 989 (affirmed in 194 F.2d 627), although actually holding that the retroactive exclusionary provision of the Technical Changes Act was applicable. The Bureau had contended that the survivorship annuity payable to Mrs. Twogood on her husband's death should have been valued at $107,945 which was the date of death cost of a single life contract paying the same annuity. The Tax Court made a finding that the Twogood contract should be valued at only $19,328 which was the date of death cost of a survivorship contract paying the same annuity. The Tax Court said (pp. 991-2):

> "A survivorship annuity is an annuity payable during the lifetime of a person (sometimes called the annuitant) commencing upon the death of another person (sometimes called the nominator). The annuity which Theresa E. Twogood received was a survivorship annuity. The seller of such an annuity, in computing the cost, must consider the age of the parties and the actuarial possibility of the annuitant surviving the nominator. * * * The actuarial formulae involved in the cost computations of such an annuity are dependent upon well recognized and established mortality tables.
>
> "The value of the survivorship annuity involved herein, which would pay Theresa E. Twogood $416.67 per month for the remainder of her life, was, on April 28, 1944, the date of decedent's death, $19,328.57."

Defendant relied below on the following citations:

United States v. Ryerson, 312 U.S. 260 (1941);

Estate of Walker, 8 T.C. 1107 (1947);

Mearkle's Estate v. Commissioner, 129 F.2d 386 (CA 3—1942);

United States Trust Co. v. Higgins, 56 F. Supp. 997 (S.D. N.Y. 1942);

Estate of Welliver, 8 T.C. 165 (1947).

The *Ryerson* and *Walker* cases did not involve annuity contracts and go no further than holding that replacement cost is the correct measure of value of *life insurance* contracts in a proper case. They have no application here. The *Welliver* case also is not akin to the present one. It holds only and correctly that cost of comparable annuity contracts is to be determined as of date of death and not as of date of transfer. It would be apropos here only if we were contending that the cost of equivalent or comparable survivorship contracts as of March 2, 1947 should be ascertained by using mortality tables, loading charge factors and assumed interest rates which were in effect when the Grant contracts were purchased instead of those being used by the issuing companies on the date of death. In the other two cases cited, the taxpayers questioned the applicability of the "comparable contract" valuation method to annuity contracts on various grounds but not on the ground that single life contracts are not comparable from an actuarial or cost standpoint. That issue was not raised.

We have read both the taxpayers' and the government's briefs in virtually all of the annuity contract valuation cases hereinbefore cited by us or cited below by the defendant, including *Higgs, Twogood, Pruyn, Clise, Mearkle* and others. We find that only in the *Higgs* case (12 T.C. 280) and *Twogood* case (15 T.C. 989) did the taxpayers make our argument that for replacement cost purposes only survivorship contracts — and not single life contracts — are

comparable. In both of them the Tax Court sustained the argument and the respondent Commissioner of Internal Revenue did not appeal. If, then, we confine ourselves to judicial precedent, we find that the "survivorship" vs. "single life" argument was not raised by the taxpayer in any of the valuation cases relied on by defendant. *On the other hand, the taxpayer was sustained in both cases in which the issue was raised.*

Defendant also argued below that plaintiff, in relying on the comparability of survivorship contracts for cost or value purposes, is looking only at "the value to a contingent beneficiary of his expectancy in an estate prior to the donor's death." There are two basic errors in this conception of our argument. First, we are looking at the value of the precise kind of property purchased and transferred by the donor in her lifetime; second, we are looking for this value at the moment of the donor's death. It is rather defendant who is looking at the value *to the beneficiary* determined *after* the donor's death.

What defendant does is to substitute another kind of property and ascertain the cost to plaintiff of this different and more costly kind of property *after* Mrs. Grant's death. This reflects a serious misconception of the nature of the transfer—and of the subject of the transfer—for estate tax purposes. It cannot be denied that the transfer was an *inter vivos* one when Mrs. Grant purchased the contracts years before her death. Whatever plaintiff got as a transferee from her he got then, and nothing she or he could do thereafter could enlarge, diminish or change what she had given him. She did not transfer anything to him by her death; nothing passed to him at her death. The character of what she had transferred years before did not change by her death. It had long since become fixed and was irrevocable

by either of them. This was the precise nature of the transfer and it was the fact of its *inter vivos* character which brings it within the orbit of 1939 Code 811(c)(1).

Now, what was the subject of this *inter vivos* transfer to plaintiff? It was a group of fourteen contract rights to the annuity payments if and when he should survive. This is all that Mrs. Grant as transferor ever purchased or gave to him. Expressed more actuarily, each contract obligated the issuing company to pay the annuities to a male one year older than the female purchaser if and when he should survive her contrary to normal expectancy. The contracts did not provide for payments to plaintiff beginning March 2, 1947 or at any other fixed or determinable date at the time when they were purchased and the transfer took place. All that was transferred by Mrs. Grant was a contingent right the cost to her of which reflected that she was purchasing for plaintiff's benefit a gamble in the strictest sense. Plaintiff might never have enjoyed the rewards of this gamble. Mortality tables said he probably would not. When Mrs. Grant's prior death brought him the enjoyment of the survivorship provisions for the first time, it was not because of any testamentary transfer—the transfer from Mrs. Grant had occurred years before—but because of the fortuitous event of his survival. *But this event did not change the character either of the transfer or of the property transferred from the standpoint of the decedent or her estate.* As the Tax Court said in *Twogood,* "the transferred property was not an annuity for * * * life but was a survivorship annuity" payable to the survivor for that part of the survivor's life after the purchaser's death, upon condition of survival.

The mistake which defendant makes is in failing to realize that the transfer itself occurred years before the trans-

feror's death and then in substituting an entirely different kind of property for valuation purposes. Defendant says that we are to take the cost *to plaintiff after Mrs. Grant's death* of contract rights to annuities to be paid *commencing March 2, 1947*. But Mrs. Grant never purchased or transferred to plaintiff any single life contract rights and the cost to plaintiff after her death of such rights is no criterion of the cost or value of the essentially different—and far less valuable—survivorship rights actually transferred by her.

Defendant also relied below on *Wishard v. United States*, 143 F.2d 704 (CA 7—1944), for the proposition that the property "must be valued in the condition in which it passed to the transferee." There the property was a cash surrender right and the cash surrender table in the policy itself fixed the amount of cash to be paid on any given date. The policy could have been surrendered at any time before the death of the husband so the transfer to the widow did not occur in a complete or taxable sense until his death. *Both the property and its enjoyment* passed to the wife only at death. In our case, the property irrevocably passed and the transfer took place years before Mrs. Grant's death and the authorities hold that, generally speaking, what the law taxes is not the interest to which the transferee succeeds but the interest transferred or which ceases. See, for example, *YMCA. v. Davis*, 264 U.S. 47, 50 (1924):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. *It was not a tax upon succession and receipt of benefits* under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased* by reason of the death. *Knowlton v. Moore*, 178 U.S. 41, 48, 49." (Our emphasis)

The basic rule that the Federal Estate Tax is imposed upon the interest transferred and not, as defendant mistakenly asserts, upon "the value of what the beneficiaries actually get" was recognized by this Court in *Commissioner v. Clise,* supra (122 F.2d at p. 1001):

> "The Federal Estate Tax is levied upon the privilege of transmission of property at death. *Saltonstall v. Saltonstall,* 276 U.S. 260, 270, 48 S.Ct. 225, 72 L.Ed. 565. It is 'death duties,' as distinguished from a legacy or succession tax. *It does not tax the interest to which the legatees and devisees succeed on death, but the interest which ceased* by reason of death; what is imposed is an excise upon the transfer of an estate upon death of the owner. *Nichols v. Coolidge,* 274 U.S. 531, 537, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; *Young Men's Christian Ass'n. v. Davis,* 264 U.S. 47, 50, 44 S.Ct. 291, 68 L.Ed. 558; *Edwards v. Slocum,* 264 U.S. 61, 62, 44 S.Ct. 293, 68 L.Ed. 564; *Knowlton v. Moore,* 178 U.S. 41, 47, 49, 20 S.Ct. 747, 44 L.Ed. 969." (Our emphasis)

Defendant tried below to make something of the fact that because of the condition of her health the insurance companies would not on the date of Mrs. Grant's death have sold to her survivorship contracts for plaintiff's benefit. Defendant reasoned from this that "a survivorship annuity contract would be actually worth substantially the same *to plaintiff* as the cost to him of a single life annuity on that day." Here, again, defendant overlooks that the test is not the worth of anything to plaintiff but is the value of the precise property transferred. The transfer by Mrs. Grant took place years before her death. The question we face is what was the value—not to plaintiff—but the fair or market value—of the same property on the subsequent date of death. The fact that Mrs. Grant because of her health may have been disqualified on the day of her death from purchas-

ing the same kind of property which she had previously bought and transferred to plaintiff does not at all vitiate the value test. The question is: What would the issuing companies have charged *any* qualified 66 year old female purchaser on March 2, 1947 for equivalent survivorship contracts for the benefit of plaintiff or any 67 year old male? This is the test of value here—just as the market quotation of a listed stock is the test of its value even though a particular legatee might be financially or otherwise disqualified from purchasing such stock himself on the date of his testator's death.

Finally, defendant protested below the dramatic force of our example of a woman who pays $60,000 for a survivorship contract which the government values in her estate at $257,000 upon her accidental death a few moments later! Defendant said that if there is an absurdity in this situation it is not because of the Commissioner's regulations but because the statute requires property to be valued as of date of death and not at original cost, citing the hypothetical case of one who buys land one day followed both by discovery of oil and by his death on the next day. We, of course, do not contend at all that original cost is any criterion of value here. Our dramatic example is simply one way of illustrating that what defendant is trying to do is to substitute an entirely different and far more costly kind of property for the property actually transferred. The absurdity which we demonstrate arises not because of the statutory requirement of date of death valuation but because the Commissioner misapplied his own "comparable contract" valuation rule by substituting a different sort of property—single life contracts—to be valued. In defendant's oil well case, the property was transferred at death and was land containing oil; the value of the land for estate tax purposes would be its value with oil. In our case, the prop-

erty was transferred long before death and was a contingent survivorship right; its date of death value must reflect two life expectancies and the contingency of survivorship. The value of a more costly single life contract calling for immediate payments commencing on a date certain has no bearing either under the statute or the Commissioner's own regulation.

Going back to our hypothetical case of the 66 year old female purchaser who sets out early one morning to purchase an annuity contract, we have four possible variations:

> *Case A:* She sets out intending to buy a survivorship annuity contract which would pay $20,774 per year for the benefit of a 67 year old male if he should survive her. She has $60,000 in currency in her purse for this purpose but she dies before reaching the insurance company office.
>
> *Case B:* She reaches the office and purchases the survivorship contract for $60,000 but dies 30 minutes later.
>
> *Case C:* She sets out intending to buy for the benefit of the same male a single life contract which would pay him the same amount per year for life commencing the very next day and she has $257,000 in currency in her purse for this purpose. She dies before reaching the insurance company office.
>
> *Case D:* She reaches the office and purchases the single life contract for $257,000 but dies 30 minutes later.

In Case A, the purchaser unsuccessfully tried to carve out and segregate from her estate the capital sum of $60,000; in Case B, she succeeded a few moments before her death. In Case C, she unsuccessfully tried to carve out and segregate from her estate the capital sum of $257,000; in Case D, she succeeded a few moments before her death.

Her estate naturally would be charged with tax on the capital sum of $60,000 in Case A; the tax naturally would be on the capital sum of $257,000 in Case C and on the $257,000 value of the single life contract in Case D. It is perfectly clear to us that the imposition of tax on a valuation of $257,000 in Case B as well would be nothing less than unconscionable and wholly incongruous. Defendant's effort to impose it in the present case reflects full failure to discriminate between (1) purchase of a contingent survivorship right which the transferee may never enjoy and (2) purchase of a contract for payment of immediate benefits to him regardless of whether or not the purchaser predeceases the transferee. The cost, value or worth of the latter kind of property right is far greater than—and hence no fair measure of the value of—the former. If defendant were to prevail on this valuation issue, the result would be to thrust upon Mrs. Grant's estate the burden of a vastly increased tax measured by a far more valuable or costly kind of property than she ever purchased, transferred or segregated from her estate.

CONCLUSION

Mrs. Grant's purchase of the annuity contracts resulted in a postponed enjoyment transfer to plaintiff with respect to the survivorship provisions. Mrs. Grant did not retain any enjoyment of the property transferred or the income therefrom because the property transferred was an irrevocable survivorship contract right. Mrs. Grant had no interest in this survivorship right and it would have terminated forever if plaintiff had predeceased her. She retained no interest in the consideration paid for the survivorship provisions because the purchase price became part of the general funds of the issuing companies without earmarking

and the companies assumed simply a personal liability. Therefore, the Grant annuity contracts were excludable from Mrs. Grant's gross estate under the retroactive provisions of the Technical Changes Act of 1949.

Regardless of their excludability from Mrs. Grant's gross estate, the Grant contracts had a date of death value of $60,980 under the "comparable contract" rule of valuation. This is what it would have cost for purchase of equivalent or comparable survivorship contracts on the date of death. Single life contracts, which would have cost plaintiff $257,117 on the date of death, are not comparable because they take no account of the element of contingency in the survivorship provisions of the Grant contracts. The property transferred by Mrs. Grant for estate tax purposes was a *contingent* survivorship contract right. In valuing this right, account must be taken of two life expectancies and of the actuarial probability of her survival of plaintiff. In this regard, the estate tax in the case of an *inter vivos* transfer is not imposed on the value to the survivor of what he comes into enjoyment of after the transferor's death but is imposed on the value of the precise property transferred by the transferor in her lifetime. The value of comparable property on the date of death was $69,980 in this case.

For either or both of the foregoing reasons plaintiff is entitled to recover the principal sum of $29,397.68 with interest as provided by law.

Respectfully submitted,

EDGAR T. ZOOK
HENRY V. COLBY
MCKEON & COLBY
Attorneys for
Plaintiff-Appellant